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Supreme Court of the United States
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OCTOBER TERM 1966

No. [REDACTED]

71

UNITED STATES OF AMERICA ex rel.

JAMES P. CARAFAS,

Petitioner,

against

HON. J. EDWIN LAVALLEE, Warden of Auburn Prison,
Auburn, New York,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the United States District Court for the Northern District of New York (FOLEY, J.), denying petitioner's application for a writ of habeas corpus after a hearing and granting a certificate of probable cause, is unreported. It is set forth at pages 10-18 of petitioner's Appendix A. The order of the United States Court of Appeals for the Second Circuit, denying petitioner's appli-

eration for leave to appeal *in forma pauperis* and granting respondent's motion to dismiss the appeal is also unreported. That order, dated February 3, 1967, is set forth at page 9 of petitioner's Appendix A. The Circuit Court's denial of a petition for rehearing, dated February 21, 1967, appears at page 8 of petitioner's Appendix A.

Jurisdiction

Petitioner apparently seeks to invoke the jurisdiction of the Court under 28 U.S.C. § 1257(3).

Question Presented

Should this Court grant certiorari to review the Court of Appeals' denial of petitioner's motion for leave *in forma pauperis* and simultaneous grant of respondent's motion to dismiss the appeal where

- (a) The Court of Appeals' decision was made after review of the entire record, including the briefs in the District Court;
- (b) the decision was made after submission of an affidavit by the respondent which requested dismissal of the appeal on the ground that the District Court decision was clearly correct and called attention to the lack of any substantial basis for an appeal; and
- (c) the petitioner was discharged from all custody prior to the time he filed the instant certiorari petition?

Statement of the Case

Petitioner and his wife, the latter not a party to any of the federal habeas corpus proceedings, were tried in the

Nassau County Court in October 1960, under an indictment charging them with having broken into a model home in Oceanside, Long Island, New York, on June 3, 1959 and having stolen a quantity of furniture from the model home. Petitioner was convicted of burglary in the third degree and grand larceny in the second degree and was sentenced to a term of three to five years imprisonment.

On appeal, following this Court's decision in *Mapp v. Ohio*, 367 U. S. 643, petitioner claimed that the fruits of an illegal search and seizure—specifically some 25 photographs of items of furniture stolen from the model home and found in petitioner's apartment on June 3, 1959—were wrongfully introduced into evidence at his trial. The conviction was, however, unanimously affirmed, without opinion, by the Appellate Division, Second Department (14 App. Div. 2d 886) and by the New York Court of Appeals (11 N. Y. 2d 891, 969). Certiorari was denied by this Court (372 U. S. 948). Petitioner then sought federal habeas corpus relief. The District Court denied the application on the ground that petitioner had failed to object at trial to the introduction of the challenged evidence; but the Circuit Court reversed, holding that the *Mapp* rule was applicable on habeas corpus to state convictions which were still in the appellate process on the date of the *Mapp* decision and remanding the case to the District Court (334 F. 2d 331).

Following this Court's denial of certiorari sought by respondent to review the Circuit Court decision (*La Vallee v. Carafas*, 381 U. S. 951), a hearing was ordered by the District Court and was held on November 5, 1965. The District Court's findings are based upon the testimony at the hearing supplemented by the record of the trial and the transcript of a hearing held in the Nassau County Court in August and September, 1962 on a motion by

petitioner to suppress evidence related to an indictment for a different burglary.*

At the District Court hearing, petitioner, his wife, and the two police officers (Nassau County detectives John Kapler and Edward Grim) who had arrested petitioner and his wife on June 3, 1959, were the only witnesses. The witnesses reaffirmed their prior testimony regarding the events of June 3, 1959, and testified further to varying extents. While some of the relevant facts have not been disputed, others were the subject of sharply conflicting testimony.

The facts regarding the police officers' investigation of the burglary of the model house, up to the point at which the detectives arrived in front of petitioner's residence in Astoria, Queens County, New York, have not been in dispute in the habeas proceeding. Briefly, they are as follows: Detectives Grim and Kapler, investigating the report of a burglary of a model home in Oceanside, went to the location on the morning of June 3, 1959 (T. 44). They were taken through the premises by a Mr. Wedgwood, who described the pieces of furniture which had been taken from the model home and showed them the remaining pieces of the bedroom set which matched the pieces taken by the burglars (T. 28, 44). While at the location, they spoke to a neighbor, who told them that earlier that morning she had seen a car—"a black and gray Cadillac with a U-Haul trailer with New Hampshire plates attached to the rear"—stuck

* As in the briefs in the District Court and in the District Court decision, references to these proceedings included in this Statement of the Case are as follows: numbers in parentheses preceded by "T" refer to the transcript of the hearing in the District Court; numbers in parentheses preceded by "Tr" refer to the pages in the transcript of petitioner's trial; and numbers in parentheses preceded by "M" refer to pages in the minutes of the 1962 suppression hearing. The latter hearing resulted in the grant of the motion to suppress, but the basis of that County Court decision was that the search in question there had taken place a day after the arrest and search in the instant case and that the evidence had been seized, without a warrant, from a locked basement room.

in the sand by the model house (M. 84; T. 45). The neighbor told them she saw an AAA truck come and assist the car and trailer out of the sand, and described the appearance of the man and woman who were in the car (M. 85; T. 45). After receiving this information, the detectives located the tow truck operator, and, through him, ascertained the name and address of the person who had been assisted—James Carafas, 3553 30th Street, Astoria (M. 85-86; T. 45-56). The detectives then proceeded to that address, where they found a black and gray Cadillac, with a U-Haul trailer bearing New Hampshire license plates attached to the rear, parked in front of the two story house (M. 142; T. 26, 46; Resp. Exh. A).

Petitioner's version of what happened next has been that the police officers went through locked front doors at the front of the house and up the stairs to his second floor apartment, burst into the apartment where he was resting on a couch, arrested him and his wife, and then commenced to search the apartment (see Tr. 169-171, 295-298; M. 16-17, 70-75). This version of the facts is in sharp contrast to the detectives' version.

According to the detectives, they arrived at the house at approximately 1:30 p.m. (M. 142; T. 26, 46). As they approached the house, they noticed a sign indicating that a Dr. Shapiro occupied a portion of the premises and, while mounting the steps to the front door, they saw a white plaque on the door which indicated that they were arriving at a time when the doctor was having his office hours (M. 143; T. 26, 41, 46; Resp. Exh. A). The outside and inside front doors were unlocked, and the detectives went through them to the doctor's waiting room, where they inquired where petitioner lived (T. 41, 46-48). Upon being informed that petitioner lived upstairs, Detective Grim went over to the foot of the stairs and shouted "Carafas", and petitioner came over to the top of the stairs and identified himself (T. 48). As the detectives looked up the stairs and

began to ascend them they could see a piece of furniture on the second floor landing which they recognized as corresponding to the description of the furniture stolen from the model home in Oceanside (T. 41-42, 48). Detective Grim informed petitioner that he was under arrest, and immediately thereafter placed petitioner's wife, who was standing by the open archway leading into the living room of the second floor apartment, under arrest (M. 146-147; T. 48-49, 69-70). The detectives then followed petitioner and his wife into the apartment, where they found an immense quantity of furniture, including each of the other items which had been reported as having been stolen from the model house in Oceanside (M. 89, 147-148; T. 49).

Dr. David Shapiro testified that he rented the first floor of the premises at 3553 30th Street from the petitioner; that he maintained regular office hours from 1 to 2 p.m. every weekday except Friday; that these hours were posted on the large sign which was on the front door of the house; and that on June 3, 1959 he had arrived at the premises shortly before 1 p.m., and had unlocked both the outside front door and the door leading from the vestibule to the foyer, in order that his patients could enter (M. 52-58).

The District Court, after having had an opportunity to assess the credibility of the petitioner, his wife, and the arresting officers, accepted as true the testimony of the detectives (Op., Petr's Appendix, p. 15). Judge Foley, in a decision and order rendered May 2, 1966, held that the detectives' entry into the house, and their arrest of Carafas after having observed the stolen furniture on the landing, were lawful, and that the search and seizure of the subsequently challenged items was incident to that lawful arrest (*id.* at pp. 15-18). In the same decision and order, Judge Foley granted a certificate of probable cause (*id.* at p. 18).

Thereafter, petitioner, who had been represented by private counsel in the District Court proceedings, applied *pro se* to the United States Court of Appeals for the Second

Circuit for leave to appeal *in forma pauperis*. In his affidavit in support of the application, he did not request the assignment of counsel. He did, however, reiterate his testimony as to the version of the detectives' entry into the house. A copy of this affidavit is reproduced in the appendix to this brief, *infra*, pp. 2a-5a.

In response to petitioner's moving papers, respondent submitted an affidavit of Assistant Attorney General Barry Mahoney. Submitted in accordance with the Court of Appeals' established practice, the affidavit reviewed the record and the District Court decision and requested that the application for leave to appeal *in forma pauperis* be denied and that the appeal be dismissed on the ground that the District Court decision was clearly correct. See appendix, *infra*, pp. 6a-10a. After examining the entire record, including briefs which were submitted to the District Court by counsel for both parties following the hearing in November 1965, the Circuit Court, on February 3, 1967, denied the application for leave to appeal *in forma pauperis* and granted the cross-motion to dismiss the appeal (Petr's Appendix A, p. 9). A petition for rehearing was denied on February 21, 1967 (Petr's Appendix A, p. 8).

On March 6, 1967, the maximum expiration date of the sentence which he has challenged in this habeas corpus proceeding, petitioner was discharged from custody. The instant certiorari petition was filed on or about March 20, 1967.

ARGUMENT

The petition presents no issue warranting review by this Court or remand to the Circuit Court.

Notwithstanding the recent decision in *Nowakowski v. Maroney*, — U. S. — 18 L. Ed. 2d 282 (Apr. 10, 1967), we respectfully submit that the petition for certiorari should be denied. Neither plenary consideration of the merits

of petitioner's claim by this Court ~~nor~~ remand to the Circuit Court is warranted by the facts here.

First, the case seems clearly distinguishable from *Nowakowski* in at least one major aspect—whereas in *Nowakowski* it appears from the Third Circuit's order that leave to appeal *in forma pauperis* was denied solely on the basis of petitioner's *pro se* request for that relief, the dismissal of the appeal in the present case was made after review of the entire record. Although there were no appellate briefs and no oral argument, there is no indication of how petitioner—who did not request the assignment of counsel—was disadvantaged thereby; there can be no doubt but that the Circuit Court considered both petitioner's motion and respondent's motion on the basis of the full record. The instant case is no different from cases in which a respondent has moved to dismiss a paid appeal as without merit and the motion has been granted. See, e.g., *United States v. Peltz*, 246 F. 2d 537, 538 (2d Cir. 1957).

Second, it seems clear that in moving to dismiss the appeal in the Circuit Court, the respondent demonstrated that the appeal was wholly lacking in merit and did not warrant taking the time of the Court for oral argument. Cf. *Coppedge v. United States*, 369 U. S. 438, 448 (1962); *United States v. Peltz*, *supra*. Thus, the affidavit pointed out (1) that the apparent theory upon which petitioner was seeking to take the *pro se* appeal was that his version of the facts was correct, a theory which the District Court, as finder of fact and judge of credibility, had wholly rejected; and (2) that the District Court's findings of fact were amply supported by the record and that, given those findings, the holding that the search was lawful was clearly correct. See respondent's affidavit, *infra*, pp. 6a-10a.

The lack of merit in the appeal is manifested by the presentation of facts in the instant certiorari petition. In the petition, as in the application for leave to appeal in

forma pauperis, petitioner sets forth a version of the facts (Pet., p. 4) which is obviously based solely on his own testimony—testimony which was flatly rejected by the District Court. Petitioner would have the Circuit Court and this Court simply ignore the testimony of the detectives which was accepted as true by the District Court. Although he suggests that the testimony of the detectives was different at the District Court hearing than at the 1960 trial, the only way in which their testimony was different at the hearing is that it covered details of the entry into the house which were not inquired into at the time of the pre-*Mapp* trial; there is no inconsistency in their trial and hearing testimony.

Given the District Court's acceptance of the officers' version of the facts, it is clear that the detectives' entry into the house which petitioner shared with the doctor, during the latter's office hours, was lawful (*cf. Polk v. United States*, 314 F. 2d 837 [9th Cir. 1963], cert. denied, 375 U. S. 844 [1964]; *United States v. Monticillos*, 349 F. 2d 80 [2d Cir. 1965]); that the detectives' observation of the piece of stolen furniture resting on the second floor landing, together with petitioner's identification of himself as "Carafas"—when viewed in light of the information known to them prior to their entry into the house—gave them ample probable cause for arresting petitioner and his wife (*cf. Ker v. California*, 374 U. S. 23, 34-35 [1964]; *Henry v. United States*, 361 U. S. 98, 102 [1960]); and that the search of the apartment was incident to this lawful arrest (*cf. United States v. Rabinowitz*, 339 U. S. 56, 63 [1950]; *Ker v. California*, *supra*, at 41 [1963]).

Third, since petitioner had been discharged from parole prior to the time he even filed the instant petition for certiorari, no purpose would be served by considering the claims raised therein. See *Parker v. Ellis*, 362 U. S. 574 (1960), holding that the discharge of a prisoner rendered

a habeas proceeding moot even after this Court had granted certiorari to review the prisoner's claim that he had been unconstitutionally denied his right to counsel at trial. As this Court emphasized in *Fay v. Noia*, 372 U. S. 391 (1963), habeas corpus is a remedy for fundamentally unlawful confinement of an individual (*id.* at 430-431). Not only was petitioner's conviction lawful, but, as the instant certiorari petition acknowledges (Pet., p. 2), he is no longer in any kind of custody.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, June 8, 1967.

Respectfully submitted,

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